Judicial Council of California Criminal Jury Instructions

CALCRIM

Supplement With Revised Instructions

As approved at the
September 2017 Judicial Council Meeting

Judicial Council of California
Advisory Committee on Criminal Jury Instructions

Hon. Sandy R. Kriegler, Chair

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Table of Revised Judicial Council of California Criminal Jury Instructions (CALCRIM)

September 2017

This Supplement of CALCRIM includes all of the revised Judicial Council of California Criminal Jury Instructions approved by the Judicial Council of California at its September 2017 meeting.

Evidence

CALCRIM No. 301. Single Witness's Testimony (*revised*)

CALCRIM No. 358. Evidence of Defendant's Statements *(revised)*

CALCRIM No. 359. Corpus Delicti: Independent Evidence of a Charged Crime *(revised)*

Homicide

CALCRIM No. 520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187) (*revised*)

CALCRIM No. 521. First Degree Murder (Pen. Code, § 189) (*revised*)

CALCRIM No. 627. Hallucination: Effect on Premeditation (*revised*)

Assaultive and Battery Crimes

CALCRIM No. 938. Sexual Battery: Misdemeanor (Pen. Code, § 243.4(e)(1)) (*revised*)

CALCRIM No. 965. Shooting at Inhabited House or Occupied Motor Vehicle (Pen. Code, § 246) (*revised*)

CALCRIM No. 985. Brandishing Imitation Firearm (Pen. Code, § 417.4) (*revised*)

Sex Offenses

CALCRIM No. 1060. Lewd or Lascivious Act: Dependent Person (Pen. Code, § 288(b)(2) & (c)(2)) *(revised)*

CALCRIM No. 1127. Engaging in Sexual Intercourse or Sodomy With Child 10 Years of Age or Younger (Pen. Code, § 288.7(a)) *(revised)*

CALCRIM No. 1128. Engaging in Oral Copulation or Sexual Penetration With Child 10 Years of Age or Younger (Pen. Code, § 288.7(b)) *(revised)*

CALCRIM No. 1161. Lewd Conduct in Public (Pen. Code, § 647(a)) *(revised)*

CALCRIM No. 1162. Soliciting Lewd Conduct in Public (Pen. Code, § 647(a)) *(revised)*

Vehicle Offenses

CALCRIM No. 2100. Driving a Vehicle or Operating a Vessel Under the Influenc Causing Injury (Veh. Code, § 23153(a), (f), (g)) *(revised)*

CALCRIM No. 2110. Driving Under the Influenc (Veh. Code, § 23152(a), (f), (g)) *(revised)*

Controlled Substances

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CALCRIM No. 2300. Sale, Transportation for Sale, etc., of Controlled Substance (Health & Saf. Code, §§ 11352, 11379) (*revised*)

CALCRIM No. 2301. Offering to Sell, Transport for Sale, etc., a Controlled Substance (Health & Saf. Code, §§ 11352, 11379) (*revised*)

CALCRIM No. 2302. Possession for Sale of Controlled Substance (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5) (*revised*)

CALCRIM No. 2303. Possession of Controlled Substance While Armed With Firearm (Health & Saf. Code, § 11370.1) (*revised*)

CALCRIM No. 2304. Simple Possession of Controlled Substance (Health & Saf. Code, §§ 11350, 11377) (*revised*)

CALCRIM No. 2306. Possession of Controlled Substance with Intent to Commit Sexual Assault (Health & Saf. Code, §§ 11350.5, 11377.5) (*new*)

CALCRIM No. 2380. Sale, Furnishing, etc., of Controlled Substance to Minor (Health & Saf. Code, §§ 11353, 11354, 11380(a)) (*revised*)

CALCRIM No. 2381. Offering to Sell, Furnish, etc., Controlled Substance to Minor (Health & Saf. Code, §§ 11353, 11354, 11380(a)) (*revised*)

CALCRIM No. 2382. Employment of Minor to Sell Controlled Substance (Health & Saf. Code, §§ 11353, 11354) (*revised*)

CALCRIM No. 2383. Use of Minor as Agent to Violate Controlled Substance Law (Health & Saf. Code, § 11380(a)) (*revised*)

CALCRIM No. 2384. Inducing Minor to Violate Controlled Substance Laws (Health & Saf. Code, §§ 11353, 11354, 11380(a)) (*revised*)

Crimes Against the Government

CALCRIM No. 2748. Possession of Controlled Substance or Paraphernalia in Penal Institution (Pen. Code, § 4573.6) ***(revised)***

Enhancement and Sentencing Factors

CALCRIM No. 3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3) (*revised*)

CALCRIM No. 3183. Sex Offenses: Sentencing Factors—Administered Controlled Substance (Pen. Code, § 667.61(e)(6)) (*revised*)

Defenses and Insanity

CALCRIM No. 3404. Accident (Pen. Code, § 195) ***(revised)***

CALCRIM No. 3414. Coercion (Pen. Code, § 236.23) ***(new)***

CALCRIM No. 3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 29.8) ***(revised)***

CALCRIM No. 3456. Initial Commitment of Mentally Disordered Offender as Condition of Parole (Pen. Code, § 2970) ***(revised)***

CALCRIM No. 3457. Extension of Commitment as Mentally Disordered Offender (Pen. Code, § 2970) ***(revised)***

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301. Single Witness's Testimony

[Unless I instruct you otherwise,] (T/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

New January 2006; Revised April 2010, February 2012, February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].)

Give the bracketed phrase if any testimony requires corroboration. See Cal. Const., art. I, § 18 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 1111.5 [in-custody informant]; 653f [solicitation of felony]; 118 [perjury]; 1108 [abortion and seduction of minor]; 532 [obtaining property by false pretenses].

AUTHORITY

- Instructional Requirements. Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885 [123 Cal.Rptr. 119, 538 P.2d 247].
- Corroboration Required. *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 125.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

RELATED ISSUES

Uncorroborated Testimony of Defendant

The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14 [268 Cal.Rptr. 706, 789 P.2d 887].)

Uncorroborated Testimony in Sex Offense Cases

In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541,

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828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

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358. Evidence of Defendant's Statements

You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

New January 2006; Revised June 2007, December 2008, February 2014, August 2015, September 2017

BENCH NOTES

Instructional Duty

There is no sua sponte duty to give this instruction. *People v. Diaz* (2015) 60 Cal.4th 1176, 1190 [185 Cal.Rptr.3d 431, 345 P.3d 62].

Give the bracketed cautionary instruction on request if there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62].) In the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

The bracketed cautionary instruction is not required when the defendant's incriminating statements are written or tape-recorded. (*People v. Gardner* (1961) 195 Cal.App.2d 829, 833 [16 Cal.Rptr. 256]; *People v. Hines* (1964) 61 Cal.2d 164, 173 [37 Cal.Rptr. 622, 390 P.2d 398], disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40 [175 Cal.Rptr. 738, 631 P.2d 446]; *People v. Scherr* (1969) 272 Cal.App.2d 165, 172 [77 Cal.Rptr. 35]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [120 Cal.Rptr.2d 477, 47 P.3d 262] [admonition to view non-recorded statements with caution applies only to a defendant's incriminating statements].) If the jury heard both inculpatory and exculpatory, or only inculpatory, statements attributed to the defendant, give the bracketed paragraph. If the jury heard only exculpatory statements by the defendant, do not give the bracketed paragraph.

If the defendant was a minor suspected of murder who made a statement in a custodial interview that did not comply with Penal Code section 859.5, give the following additional instruction:

Consider with caution any statement tending to show defendant's guilt made

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by (him/her) during _____ <*insert description of interview, e.g., interview with Officer Smith of October 15, 2013*>.

When a defendant's statement is a verbal act, as in conspiracy cases, this instruction applies. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 [249 Cal.Rptr. 71, 756 P.2d 795]; *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352 [114 Cal.Rptr. 916]; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases.

When a defendant's statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction still applies. (*People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62], overruling *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509].)

Related Instructions

If out-of-court oral statements made by the defendant are prominent pieces of evidence in the trial, then CALCRIM No. 359, *Corpus Delicti: Independent Evidence of a Charged Crime*, may also have to be given together with the bracketed cautionary instruction.

AUTHORITY

- Instructional Requirements *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62]; *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].
- Custodial Statements by Minors Suspected of Murder Pen. Code, § 859.5, effective 1/1/2014.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial §§ 683–686, 723, 724, 733.

1 Witkin, California Evidence (5th ed. 2012) Hearsay § 52.

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial § 127.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.57 (Matthew Bender).

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359. Corpus Delicti: Independent Evidence of a Charged Crime

The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may rely on the defendant's out-of-court statements to convict (him/her) only if you first conclude that other evidence shows that the charged crime [or a lesser included offense] was committed.

That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

This requirement of other evidence does not apply to proving the identity of the person who committed the crime [and the degree of the crime]. If other evidence shows that the charged crime [or a lesser included offense] was committed, the identity of the person who committed it [and the degree of the crime] may be proved by the defendant's statement[s] alone.

You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt.

New January 2006; Revised August 2006, February 2014, February 2015, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on corpus delicti whenever an accused's extrajudicial statements form part of the prosecution's evidence. (*People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426] [instruction required for defense admissions].) If the defendant's extrajudicial statements constitute the crime, as with criminal threats, the rationale in *Howk* may not apply, however.

The corpus delicti cannot be proved by statements made before or after the crime, but can be proved by statements made during the crime. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 [63 Cal.Rptr.2d 1, 935 P.2d 708].)

Give the bracketed language in the first paragraph if the court will be instructing on lesser included offenses.

An earlier version of this instruction was upheld in *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1496 [60 Cal.Rptr.3d 777]. A later case, *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1427–1429 [155 Cal.Rptr.3d 403], found fault with the same earlier version of the instruction without referring to *Reyes*. The instruction has been modified in light of the discussion in *Rivas*.

AUTHORITY

- Instructional Requirements. *People v. Ray* (1996) 13 Cal.4th 313, 342 [52

Copyright Judicial Council of California

Cal.Rptr.2d 296, 914 P.2d 846]; *People v. Jennings* (1991) 53 Cal.3d 334, 368 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].

- Burden of Proof. *People v. Lara* (1994) 30 Cal.App.4th 658, 676 [35 Cal.Rptr.2d 886].
- Earlier Version of This Instruction Correctly States the Law. *People v. Rosales* (2014) 222 Cal.App.4th 1254, 1260–1261 [166 Cal.Rptr.3d 620]; *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1496 [60 Cal.Rptr.3d 777].
- Proof of Identity Independent of "Elements." *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1427–1429 [155 Cal.Rptr.3d 403].
- Corpus Delicti Rule Does Not Apply Generally to All Uncharged Acts. *People v. Davis* (2008) 168 Cal.App.4th 617, 636 [86 Cal.Rptr.3d 55].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Elements, §§ 47–54.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, §§ 30.04[2], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.04[2][c]; Ch. 87, *Death Penalty*, § 87.13[17][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.01 (Matthew Bender).

COMMENTARY

Harm Caused by Criminal Conduct

The instruction states that the other evidence need only "be enough to support a reasonable inference that someone's criminal conduct caused an injury, loss, or harm." This is based in part on *People v. Alvarez* (2002) 27 Cal.4th 1161, 1171 [119 Cal.Rptr.2d 903, 46 P.3d 372], in which the court stated that "[t]here is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency." (Citing *People v. Jones* (1998) 17 Cal.4th 279, 303 [70 Cal.Rptr.2d 793, 949 P.2d 890].)

Scope of Corpus Delicti

The following are not elements of a crime and need not be proved by independent evidence: the degree of the crime charged (*People v. Cooper* (1960) 53 Cal.2d 755, 765 [3 Cal.Rptr. 148, 349 P.2d 964]), the identity of the perpetrator (*People v. Westfall* (1961) 198 Cal.App.2d 598, 601 [18 Cal.Rptr. 356]), elements of the underlying felony when the defendant is charged with felony murder (*People v. Cantrell* (1973) 8 Cal.3d 672, 680–681 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]), special circumstances when the

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defendant is charged with a felony-based special circumstance murder as listed in Penal Code section 190.2(a)(17) (Pen. Code, § 190.41; see *People v. Ray* (1996) 13 Cal.4th 313, 341, fn. 13 [52 Cal.Rptr.2d 296, 914 P.2d 846]), the knowledge and intent required for aider-abettor liability (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1128–1129 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Ott* (1978) 84 Cal.App.3d 118, 131 [148 Cal.Rptr. 479]), or facts necessary for a sentencing enhancement (see *People v. Shoemake* (1993) 16 Cal.App.4th 243, 252–256 [20 Cal.Rptr.2d 36]).

RELATED ISSUES

Truth-in-Evidence Initiative

The "truth-in-evidence" provision of the California Constitution abrogates the corpus delicti rule insofar as it restricts the admissibility of incriminatory extrajudicial statements by an accused. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173–1174 [119 Cal.Rptr.2d 903, 46 P.3d 372]; see Cal. Const., art. I, § 28(d) [Proposition 8 of the June 8, 1982 General Election].) The constitutional provision, however, does not eliminate the rule insofar as it prohibits *conviction* when the only evidence that the crime was committed is the defendant's own statements outside of court. Thus, the provision does not affect the rule to the extent it requires a jury instruction that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1180.)

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520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)

The defendant is charged [in Count _____] with murder [in violation of Penal Code section 187].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant committed an act that caused the death of (another person/ [or] a fetus);**

[AND]

2. **When the defendant acted, (he/she) had a state of mind called malice aforethought(;/.)**

<Give element 3 when instructing on justifiable or excusable homicide.>

[AND

3. **(He/She) killed without lawful (excuse/[or] justification).]**

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant acted with *express malice* if (he/she) unlawfully intended to kill.

The defendant acted with *implied malice* if:

1. **(He/She) intentionally committed an act;**
2. **The natural and probable consequences of the act were dangerous to human life;**
3. **At the time (he/she) acted, (he/she) knew (his/her) act was dangerous to human life;**

AND

4. **(He/She) deliberately acted with conscious disregard for (human/ [or] fetal) life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

[It is not necessary that the defendant be aware of the existence of a fetus to be guilty of murdering that fetus.]

[A *fetus* is an unborn human being that has progressed beyond the

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embryonic stage after major structures have been outlined, which typically occurs at seven to eight weeks after fertilization.]

[An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[(A/An) _____ <*insert description of person owing duty*> **has a legal duty to (help/care for/rescue/warn/maintain the property of/** _____ <*insert other required action[s]*>**)** _____ <*insert description of decedent/person to whom duty is owed*>**.**

If you conclude that the defendant owed a duty to _____ <*insert name of decedent*>**, and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act.]**

<*Give the following bracketed paragraph if the second degree is the only possible degree of the crime for which the jury may return a verdict*>

[If you find the defendant guilty of murder, it is murder of the second degree.]

<*Give the following bracketed paragraph if there is substantial evidence of first degree murder*>

[If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. _____ <*insert number of appropriate first degree murder instruction*>**.]**

New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM

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Nos. 505–627, and CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction and definition in the second bracketed causation paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give the bracketed portion that begins, "(A/An) _____ <*insert description of person owing duty*> has a legal duty to." Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *First Degree Murder*. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first or second degree felony murder, instruct on those crimes and give CALCRIM No. 548, *Murder: Alternative Theories*.

AUTHORITY

- Elements. Pen. Code, § 187.
- Malice. Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- Causation. *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Fetus Defined. *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice. *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- This Instruction Upheld. *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

Secondary Sources

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1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 96–101, 112–113.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted Murder. Pen. Code, §§ 663, 189.
- Sentence Enhancements and Special Circumstances Not Considered in Lesser Included Offense Analysis. *People v. Boswell* (2016) 4 Cal.App.5th 55, 59–60 [208 Cal.Rptr.3d 244].

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result"].)

Second Degree Murder of a Fetus

The defendant does not need to know a woman is pregnant to be convicted of second degree murder of her fetus. (*People v. Taylor* (2004) 32 Cal.4th 863, 868 [11 Cal.Rptr.3d 510, 86 P.3d 881] ["[t]here is no requirement that the defendant specifically know of the existence of each victim."]) "[B]y engaging in the conduct he did, the defendant demonstrated a conscious disregard for all life, fetal or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

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521. First Degree Murder (Pen. Code, § 189)

<Select the appropriate section[s]. Give the final paragraph in every case.>

<Give if multiple theories alleged.>

[The defendant has been prosecuted for first degree murder under (two/ _____ <*insert number*>) theories: (1) _____ <*insert first theory, e.g., "the murder was willful, deliberate, and premeditated"*> [and] (2) _____ <*insert second theory, e.g., "the murder was committed by lying in wait"*> [_____ <*insert additional theories*>].

Each theory of first degree murder has different requirements, and I will instruct you on (both/all _____ <*insert number*>).

You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.]

<A. Deliberation and Premeditation>

[The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant *acted with premeditation* if (he/she) decided to kill before completing the act[s] that caused death.

The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.]

<B. Torture>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:

1. **(He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;**
2. **(He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;**

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3. The acts causing death involved a high degree of probability of death;

AND

4. The torture was a cause of death.]

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person *deliberates* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act. The defendant *acted with premeditation* if (he/she) decided to kill before completing the act[s] that caused death.]

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. (He/She) concealed (his/her) purpose from the person killed;

2. (He/She) waited and watched for an opportunity to act;

AND

3. Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.]

[An *explosive* is any substance, or combination of substances, (1) whose

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main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is [also] any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[_____ <*insert type of explosive from Health & Saf. Code, § 12000*> is an *explosive*.]

[A *destructive device* is _____ <*insert definition supported by evidence from Pen. Code, § 16460*>.]

[_____ <*insert type of destructive device from Pen. Code, § 16460*> is a *destructive device*.]

<E. Weapon of Mass Destruction>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

[_____ <*insert type of weapon from Pen. Code, § 11417(a)(1)*> is a *weapon of mass destruction*.]

[_____ <*insert type of agent from Pen. Code, § 11417(a)(2)*> is a *chemical warfare agent*.]]

<F. Penetrating Ammunition>

[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]

<G. Discharge From Vehicle>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:

1. **(He/She) shot a firearm from a motor vehicle;**
2. **(He/She) intentionally shot at a person who was outside the vehicle;**

AND

3. **(He/She) intended to kill that person.**

A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an

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explosion or other form of combustion.

A *motor vehicle* includes (a/an) (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/ _____ <*insert other type of motor vehicle*>).]

<H. Poison>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.

[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]]

[_____ <*insert name of substance*> is a *poison*.]

[The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.]

The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.

New January 2006; Revised August 2006, June 2007, April 2010, October 2010, February 2012, February 2013, February 2015, August 2015, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final paragraph in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with "The defendant has been prosecuted for first degree murder under." If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of "deliberate" and "premeditated" if those terms have not already been defined for the jury.

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, "_____ is a weapon of mass destruction" or "is a chemical warfare agent,"

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only if the device used is listed in the code section noted in the instruction. For example, "Sarin is a chemical warfare agent." However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, "the defendant used a chemical warfare agent, sarin," or "the material used by the defendant, sarin, was a chemical warfare agent." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

Do **not** modify this instruction to include the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]. Although those factors may assist in appellate review of the sufficiency of the evidence to support findings of premeditation and deliberation, they neither define the elements of first degree murder nor guide a jury's determination of the degree of the offense. (*People v. Moon* (2005) 37 Cal.4th 1, 31 [32 Cal.Rptr.3d 894, 117 P.3d 591]; *People v. Steele* (2002) 27 Cal.4th 1230, 1254 [120 Cal.Rptr.2d 432, 47 P.3d 225]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 [245 Cal.Rptr. 185, 750 P.2d 1342].)

AUTHORITY

- Types of Statutory First Degree Murder. Pen. Code, § 189.
- Armor Piercing Ammunition Defined. Pen. Code, § 16660.
- Destructive Device Defined. Pen. Code, § 16460.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death. *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22, 139 P.3d 492].
- Mental State Required for Implied Malice. *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- Explosive Defined. Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined. Pen. Code, § 11417.
- Discharge From Vehicle. *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements. *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]*; People v. Poindexter* (2006) 144 Cal.App.4th 572, 582–585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined. *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined. *People v. Pearson* (2013) 56 Cal.4th 393, 443–444 [154 Cal.Rptr.3d 541, 297 P.3d 793]; *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].

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- Torture Requirements. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 117.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Murder. Pen. Code, § 187.
- Voluntary Manslaughter. Pen. Code, § 192(a).
- Involuntary Manslaughter. Pen. Code, § 192(b).
- Attempted First Degree Murder. Pen. Code, §§ 663, 189.
- Attempted Murder. Pen. Code, §§ 663, 187.
- Elements of Special Circumstances Not Considered in Lesser Included Offense Analysis. *People v. Boswell* (2016) 4 Cal.App.5th 55, 59–60 [208 Cal.Rptr.3d 244].

RELATED ISSUES

Premeditation and Deliberation—Heat of Passion Provocation

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, "leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation"]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder].) There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

Torture—Causation

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim's death. "The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that

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constitutes the torture [citation]." (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

Torture—Instruction on Voluntary Intoxication

"[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242 [278 Cal.Rptr. 640, 805 P.2d 899]; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

Torture—Pain Not an Element

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899].)

Torture—Premeditated Intent to Inflict Pain

Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation

In *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481], the court approved this instruction regarding the length of time a person lies in wait: "[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation."

Discharge From a Vehicle—Vehicle Does Not Have to Be Moving

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

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627. Hallucination: Effect on Premeditation

A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening.

You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation.

The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder.

New January 2006; Revised February 2015, September 2017

BENCH NOTES

Instructional Duty

This is a pinpoint instruction to be given only on request when the evidence supports the defense theory. (*People v. McCarrick* (2016) 6 Cal.App.5th 227, 243 [210 Cal.Rptr.3d 838].) The court may need to modify this instruction if evidence of delusions, rather than hallucinations, is offered. (*People v. Gana* (2015) 236 Cal.App.4th 598, 605–606 [186 Cal.Rptr.3d 724].)

"[E]vidence of a hallucination—a perception with no objective reality—is inadmissible to negate malice so as to mitigate murder to voluntary manslaughter but is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder." (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677 [126 Cal.Rptr.2d 889].)

AUTHORITY

- Hallucination Evidence. *People v. Padilla* (2002) 103 Cal.App.4th 675, 677 [126 Cal.Rptr.2d 889].
- Hallucination Alone Not a Basis for Imperfect Self-Defense. *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 [38 Cal.Rptr.3d 404].
- Imperfect Self-Defense Does Not Apply When Defendant's Belief in Need for Self-Defense is Entirely Delusional. *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 107–108.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73,

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Defenses and Justifications, § 73.03 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* § 142.01[1][g] (Matthew Bender).

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938. Sexual Battery: Misdemeanor (Pen. Code, § 243.4(e)(1))

The defendant is charged [in Count _____] with sexual battery [in violation of Penal Code section 243.4(e)(1)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant touched an intimate part of _____ <*insert name of complaining witness*>;**
2. **The touching was done against _____'s <*insert name of complaining witness*> will;**

AND

3. **The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.**

An *intimate part* is a female's breast or the anus, groin, sexual organ, or buttocks of anyone.

***Touching*, as used here, means making physical contact with another person. *Touching* includes contact made through the clothing.**

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

<*Defense: Reasonable Belief in Consent*>

[The defendant is not guilty of sexual battery if (he/she) actually and reasonably believed that the other person consented to the touching [and actually and reasonably believed that (he/she) consented throughout the act of touching]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006, Revised February 2016, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on the defense of mistaken but honest and reasonable belief in consent if there is substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe

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consent existed where it did not. (See *People v. Andrews* (2015) 234 Cal.App.4th 590, 602 [184 Cal.Rptr.3d 183]; following *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961]; *People v. Mayberry* (1975) 15 Cal.3d 143, 153–158 [125 Cal.Rptr. 745, 542 P.2d 1337].)

Give the bracketed definition of "against a person's will" on request.

AUTHORITY

- Elements. Pen. Code, § 243.4(e)(1).
- Touches Defined. Pen. Code, § 243.4(e)(2).
- Intimate Part Defined. Pen. Code, § 243.4(g)(1).
- Consent Defined. Pen. Code, §§ 261.6, 261.7.
- Specific-Intent Crime. *People v. Chavez* (2000) 84 Cal.App.4th 25, 29 [100 Cal.Rptr.2d 680].
- Defendant Must Touch Intimate Part of Victim. *People v. Elam* (2001) 91 Cal.App.4th 298, 309–310 [110 Cal.Rptr.2d 185].
- Defendant Need Not Touch Skin. *People v. Dayan* (1995) 34 Cal.App.4th 707, 716 [40 Cal.Rptr.2d 391].

LESSER INCLUDED OFFENSES

- Misdemeanor sexual battery is not a lesser included offense of sexual battery by misrepresentation of professional purpose under the statutory elements test. *People v. Robinson* (2016) 63 Cal.4th 200, 210–213 [202 Cal.Rptr.3d 485, 370 P.3d 1043].
- Attempted sexual battery is not a lesser included offense of sexual battery by fraudulent representation. *People v. Babaali* (2009) 171 Cal.App.4th 982, 1000 [90 Cal.Rptr.3d 278].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 26.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[2] (Matthew Bender).

COMMENTARY

In a case addressing the meaning of for the "purpose of . . . sexual abuse" in the context of Penal Code section 289, one court has stated that "when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever." (*People v. White* (1986) 179 Cal.App.3d 193, 205 [224 Cal.Rptr. 467].) If the court concludes that this reasoning applies to the crime of sexual battery and a party requests a definition of "sexual abuse," the following language may be used:

Sexual abuse means any touching of a person's intimate parts in order to cause

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pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

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965. Shooting at Inhabited House or Occupied Motor Vehicle (Pen. Code, § 246)

The defendant is charged [in Count _____] with shooting at an (inhabited house/inhabited house car/inhabited camper/occupied building/occupied motor vehicle/occupied aircraft) [in violation of Penal Code section 246].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously shot a firearm;**

[AND]

2. **The defendant shot the firearm at an (inhabited house/inhabited house car/inhabited camper/occupied building/occupied motor vehicle/occupied aircraft)(;/.)**

<Give element 3 when instructing on self-defense or defense of another.>

[AND

3. **The defendant did not act (in self-defense/ [or] in defense of someone else).]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to disturb, annoy, or injure someone else.

[A (house/house car/camper) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged shooting.]

[A (house/house car/camper) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (house/house car/camper) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A house includes any (structure/garage/office/ _____ *<insert other structure>*) that is attached to the house and functionally connected with it.]

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/ bus/school bus/commercial vehicle/truck tractor and trailer/

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_____ <*insert other type of motor vehicle*>**.]**

[A *house car* is a motor vehicle originally designed, or permanently altered, and equipped for human habitation, or to which a camper has been permanently attached.]

[A *camper* is a structure designed to be mounted upon a motor vehicle and to provide facilities for human habitation or camping purposes.]

[An *aircraft* is an airplane or other craft intended for and capable of transporting persons through the air.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.]

[The term[s] (*firearm*/ _____ <*insert other term*>) (is/are) defined in another instruction to which you should refer.]

New January 2006; Revised February 2012, August 2012, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

Give the relevant bracketed definitions unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Related Instructions

CALCRIM No. 966, *Shooting at Uninhabited House or Unoccupied Motor Vehicle*.

CALCRIM No. 967, *Shooting at Unoccupied Aircraft*.

AUTHORITY

- Elements. Pen. Code, § 246.
- Meaning of "at" in Pen. Code, § 246. *People v. Cruz* (1995) 38 Cal.App.4th 427, 431–433 [45 Cal.Rptr.2d 148].
- Aircraft Defined. Pen. Code, § 247.
- Camper Defined. Veh. Code, § 243.
- Firearm Defined. Pen. Code, § 16520.
- House Car Defined. Veh. Code, § 362.

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- Malicious Defined. Pen. Code, § 7(4); *People v. Watie* (2002) 100 Cal.App.4th 866, 879 [124 Cal.Rptr.2d 258].
- Motor Vehicle Defined. Veh. Code, § 415.
- Willful Defined. Pen. Code, § 7(1); *In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1438 [35 Cal.Rptr.2d 155].
- General Intent Crime. *People v. Jischke* (1996) 51 Cal.App.4th 552, 556 [59 Cal.Rptr.2d 269]; *People v. Cruz* (1995) 38 Cal.App.4th 427, 431–433 [45 Cal.Rptr.2d 148] [intent to strike building not required].
- Occupied Building. *People v. Adams* (1982) 137 Cal.App.3d 346, 354–355 [187 Cal.Rptr. 505] [attached garage].
- Occupied Motor Vehicle. *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1638 [273 Cal.Rptr. 397] [tractor/trailer rig being operated on a road].
- House Not Inhabited Means Former Residents Not Returning. *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].
- Offense of Discharging Firearm at Occupied Vehicle Can Be Committed When Gun Is Inside Vehicle. *People v. Manzo* (2012) 53 Cal.4th 880, 889–890 [138 Cal.Rptr. 16, 270 P.3d 711].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 49, 50.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, §§ 144.01[1][i], 144.03[2], [4] (Matthew Bender).

LESSER INCLUDED OFFENSES

Assault with a deadly weapon (Pen. Code, § 245) is not necessarily included in the offense of discharging a firearm at an occupied vehicle. (*In re Daniel R.* (1993) 20 Cal.App.4th 239, 244, 247 [24 Cal.Rptr.2d 414].)

Grossly negligent discharge of a firearm pursuant to Penal Code section 246.3(a) is a lesser included offense of discharging a firearm at an occupied building. (*People v. Ramirez* (2009) 45 Cal.4th 980, 990 [89 Cal.Rptr.3d 586, 201 P.3d 466].)

RELATED ISSUES

Concurrent Sentence for Firearm Possession

If a prior felon arrives at the scene already in possession of a firearm and then shoots at an inhabited dwelling, Penal Code section 654 does not preclude imposing sentences for both offenses. (*People v. Jones* (2002) 103 Cal.App.4th 1139 [127 Cal.Rptr.2d 319].)

Shooting Weapon Inside Dwelling

"[T]he firing of a pistol within a dwelling house does not constitute a violation of Penal Code section 246." (*People v. Stepney* (1981) 120 Cal.App.3d 1016, 1021 [175 Cal.Rptr. 102] [shooting television inside dwelling].) However, shooting from

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"inside [an] apartment . . . in the direction of the apartment below" is a violation of section 246. (*People v. Jischke* (1996) 51 Cal.App.4th 552, 556 [59 Cal.Rptr.2d 269].)

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985. Brandishing Imitation Firearm (Pen. Code, § 417.4)

The defendant is charged [in Count _____] with brandishing an imitation firearm [in violation of Penal Code section 417.4].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drew or exhibited an imitation firearm in a threatening manner against another person;**
2. **The defendant's act caused someone to fear bodily harm to himself or herself or someone else;**

[AND]

3. **That fear of harm was reasonable(;/.)**

<Give element 4 when instructing on self-defense or defense of another.>

[AND

4. **When the defendant drew or exhibited the imitation firearm, (he/she) was not acting (in self-defense/ [or] in defense of someone else).]**

An *imitation firearm* is a device[, or a toy gun, replica of a firearm, gun-shaped phone case, or BB device,] that is so substantially similar to a real firearm in color and overall appearance that a reasonable person would believe that it is a real firearm. [A *BB device* is an instrument that expels a projectile, such as a BB or other pellet, either 6 millimeters or 8 millimeters in caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun that expels a projectile 10 millimeters or less in caliber.]

New January 2006; Revised February 2012, February 2016, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 4 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

AUTHORITY

- Elements. Pen. Code, § 417.4.
- Imitation Firearm. Pen. Code, § 16700.

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- BB Device Defined. Pen. Code, § 16250.
- Reasonable Person Must Be Placed in Fear. *In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].
- Person Placed in Fear May Be Bystander. *In re Michael D.* (2002) 100 Cal.App.4th 115, 120–123 [121 Cal.Rptr.2d 909].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][e], [h] (Matthew Bender).

RELATED ISSUES

Reasonable Person Who Fears Harm May Be Bystander

Penal Code section 417.4 requires not "only the presence of another person against whom the imitation firearm is displayed or exhibited, but also some person's knowledge of, and a reaction to, the perpetrator's action." (*In re Michael D.* (2002) 100 Cal.App.4th 115, 124 [121 Cal.Rptr.2d 909].) Thus, someone must be placed in fear as a result of the defendant's conduct; however, this does not have to be the person against whom the object is exhibited. (*Id.* at pp. 120–123.) The term "reasonable person," as used in the statute "refers to anyone who witnesses the actions of the perpetrator, not just to the person against whom the device is drawn or exhibited." (*Id.* at p. 123.)

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1060. Lewd or Lascivious Act: Dependent Person (Pen. Code, § 288(b)(2) & (c)(2))

The defendant is charged [in Count _____] with a lewd or lascivious act on a dependent person [by force or fear] [in violation of Penal Code section 288].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant was a caretaker of a dependent person;**
2. **The defendant, while serving as a caretaker, willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on that person;**

[AND]

3. **The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent person(;/.)**

<Give element 4 when instructing on force or violence>

[AND

4. **In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent person or someone else.]**

A *lewd or lascivious act* is any touching of a person with the intent to sexually arouse the perpetrator or the other person. A *lewd or lascivious act* includes touching any part of the person's body, either on the bare skin or through the clothes the person is wearing. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

A *caretaker* is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including (a/an) _____ *<insert specific facility from Pen. Code, § 288(f)(1)>*, that provides care for dependent persons or for those aged 65 or older.

A *dependent person* is someone who has physical or mental impairments

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that substantially restrict his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose physical or mental abilities have been significantly diminished by age.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or dependent person is not required.]

[The *force* used must be substantially different from or substantially greater than the force needed to accomplish the lewd and lascivious act itself.]

[*Duress* is a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do [or submit to] something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the dependent person and (his/her) relationship to the defendant.] [*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is accomplished by *fear* if the dependent person is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

New January 2006; Revised February 2013, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) The court must determine whether it is appropriate to give the standard unanimity instruction, CALCRIM No. 3500, *Unanimity*, or the modified unanimity instruction, CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with using force or fear in committing the lewd act on a dependent person, give bracketed element 4 and the bracketed sentence that begins with "The force must be substantially different." (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [court has **sua sponte** duty to define "force" as used in Pen. Code, § 288(b)(1)]; *People v. Griffin* (2004) 33 Cal.4th 1015,

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1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) On request, give any of the relevant bracketed definitions of duress, menace, or fear.

In the paragraph defining "caretaker," insert applicable caretaker facilities listed in Penal Code section 288(f)(1), such as a 24-hour health facility, a home health agency, or a community care or respite care facility, depending on the facts of the case.

Penal Code section 288(b)(2) or (c)(2) does not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person. (Pen. Code, § 288(h).)

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].)

Defenses—Instructional Duty

In the context of lewd acts accomplished by force on a minor, there is disagreement as to whether knowing consent by the minor is an affirmative defense. (See *People v. Cicero* (1984) 157 Cal.App.3d 465, 484–485 [204 Cal.Rptr. 582] [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158 [249 Cal.Rptr. 435] [lewd act need not be against will of victim, following dissent in *Cicero, supra,* 157 Cal.App.3d at pp. 487–488, dis. opn. of Regan, Acting P.J.]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [26 Cal.Rptr.2d 567] [dicta].) If the court concludes that consent is a defense and there is sufficient evidence, the court has a **sua sponte** duty to instruct on the defense. (See consent defense instructions in CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.)

AUTHORITY

- Elements. Pen. Code, § 288(b)(2) & (c)(2).
- Caretaker Defined. Pen. Code, § 288(f)(1) & (g).
- Dependent Person Defined. Pen. Code, § 288(f)(3).
- Duress Defined. *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Elder Defined. See Pen. Code, § 368(g).
- Menace Defined. See Pen. Code, § 261(c) [in context of rape].
- Actual Arousal Not Required. See *People v. McCurdy* (1923) 60 Cal.App. 499, 502 [213 P. 59].
- Any Touching With Intent to Arouse. See *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037] [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 [14 Cal.Rptr.2d 67] and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [49 Cal.Rptr.2d 252] [list of examples].

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- Dependent Person Touching Own Body Parts at Defendant's Instigation. See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 [199 Cal.Rptr. 586] ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115 [168 Cal.Rptr. 401].
- Fear Defined. See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567]; *People v. Iniguez* (1994) 7 Cal.4th 847 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [in context of rape].
- Force Defined. *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221]; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089] [discussing *Cicero* and *Pitmon*].
- Lewd Defined. See *In re Smith* (1972) 7 Cal.3d 362, 365 [102 Cal.Rptr. 335, 497 P.2d 807] [in context of indecent exposure]; see *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257, fn. 13 [158 Cal.Rptr. 330, 599 P.2d 636].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 41, 47–55, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.21[1][a][iv], [v], [b]–[d] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of the crime of lewd acts by force that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [26 Cal.Rptr.2d 567] [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [30 Cal.Rptr.2d 258, 872 P.2d 1183] [fear in context of rape].) The Court of Appeal has held that the definition of "force" as used in Penal Code section 288(b), subsection (1) (lewd acts by force with a minor) is different from the meaning of "force" as used in other sex offense statutes. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582].) In other sex offense statutes, such as Penal Code section 261 defining rape, "force" does not have a technical meaning and there is no requirement to define the term. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1018–1019 [16 Cal.Rptr.3d 891, 94 P.3d 1089].) In Penal Code section 288(b)(1), on the other hand, "force" means force "*substantially* different from or *substantially* greater than" the physical force normally inherent in the sexual act. (*Id.* at p. 1018 [quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 [204 Cal.Rptr. 582] [emphasis in *Griffin*].) The court is required to instruct **sua sponte** in this special definition of "force." (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 52; see also *People v. Griffin, supra,* 33 Cal.4th at pp. 1026–1028.) It would seem that this definition of "force" would also apply to the crime of lewd acts with a

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dependant person, under Penal Code section 288(b) subsection (2).

The court is not required to instruct sua sponte on the definition of "duress" or "menace" and Penal Code section 288 does not define either term. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221] [duress]). Optional definitions are provided for the court to use at its discretion. The definition of "duress" is based on *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071], and *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]. The definition of "menace" is based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416] [using rape definition in case involving forcible lewd acts].) In *People v. Leal, supra,* 33 Cal.4th at p. 1007, the court held that the statutory definition of "duress" contained in Penal Code sections 261 and 262 does not apply to the use of that term in any other statute. The court did not discuss the statutory definition of "menace." The court should consider the *Leal* opinion before giving the definition of "menace."

LESSER INCLUDED OFFENSES

- Attempted Lewd Act With Dependent Person. Pen. Code, §§ 664, 288(c)(2).
- Attempted Lewd Act by Force With Dependent Person. Pen. Code, §§ 664, 288(b)(2).
- Simple Battery Not Lesser Included Offense of Lewd Act on Dependent Person Under the Statutory Elements Test. *People v. Chenelle* (2016) 4 Cal.App.5th 1255, 1263–1264 [209 Cal.Rptr.3d 371].

RELATED ISSUES

Developmental Disability

If the dependent person has a developmental disability, arguably there is no sua sponte duty to define "developmental disability" under Welfare and Institutions Code section 4512(a) or Penal Code section 1370.1(a)(1). The Legislature did not intend to limit this phrase in other code sections to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (See *People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [85 Cal.Rptr.2d 474] [in context of oral copulation of disabled person].)

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1127. Engaging in Sexual Intercourse or Sodomy With Child 10 Years of Age or Younger (Pen. Code, § 288.7(a))

The defendant is charged [in Count _____] with engaging in (sexual intercourse/ [or] sodomy) with a child 10 years of age or younger [in violation of Penal Code section 288.7(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant engaged in an act of (sexual intercourse/ [or] sodomy) with _____ <*insert name of complaining witness*>;**
2. **When the defendant did so, _____ <*insert name of complaining witness*> was 10 years of age or younger;**
3. **At the time of the act, the defendant was at least 18 years old.**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[*Sexual intercourse* means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]]

[*Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]]

New August 2009; Revised February 2013, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 288.7(a).
- Penetration Defined. Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Sodomy Defined. Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].
- Calculating Age. Fam. Code, § 6500; *People v. Cornett* (2012) 53 Cal.4th 1261, 1264, 1275 [139 Cal.Rptr.3d 837, 274 P.3d 456] ["10 years of age or younger" means "under 11 years of age"]; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 23, 29, 178.

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

LESSER INCLUDED OFFENSE

- Attempts to commit the following crimes are **not** lesser included offenses of the underlying crime: sexual intercourse with child 10 years of age or younger, sodomy with a child 10 years of age or younger, oral copulation with a child 10 years of age or younger. *People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 [191 Cal.Rptr.3d 905].

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1128. Engaging in Oral Copulation or Sexual Penetration With Child 10 Years of Age or Younger (Pen. Code, § 288.7(b))

The defendant is charged [in Count _____] with engaging in (oral copulation/ [or] sexual penetration) with a child 10 years of age or younger [in violation of Penal Code section 288.7(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant engaged in an act of (oral copulation/ [or] sexual penetration) with _____ <*insert name of complaining witness*>;**
2. **When the defendant did so, _____ <*insert name of complaining witness*> was 10 years of age or younger;**
3. **At the time of the act, the defendant was at least 18 years old.**

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[*Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.]

[*Sexual penetration* means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.]

New August 2009; Revised April 2010, February 2013, February 2015, September 2017

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 288.7(b).
- Sexual Penetration Defined. Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not vagina].
- Unknown Object Defined. Pen. Code, § 289(k)(3).
- Foreign Object, Substance, Instrument, or Device Defined. Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [finger is "foreign object"].
- Oral Copulation Defined. *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Calculating Age. Fam. Code, § 6500; *People v. Cornett* (2012) 53 Cal.4th 1261, 1264, 1275 [139 Cal.Rptr.3d 837, 274 P.3d 456] ["10 years of age or younger" means "under 11 years of age"]; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Sexual Abuse Defined. *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, § 58.

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[7] (Matthew Bender).

LESSER INCLUDED OFFENSE

- Attempted Sexual Penetration. *People v. Ngo* (2014) 225 Cal.App.4th 126, 158–161 [170 Cal.Rptr.3d 90].
- Attempt to commit oral copulation with a child 10 years of age or younger is **not** a lesser included offense. *People v. Mendoza* (2015) 240 Cal.App.4th 72, 83 [191 Cal.Rptr.3d 905].

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1161. Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count _____] with engaging in lewd conduct in public [in violation of Penal Code section 647(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully engaged in the touching of ((his/her) own/ [or] another person's) (genitals[,]/ [or] buttocks[,]/ [or] female breast);**
2. **The defendant did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**
3. **At the time the defendant engaged in the conduct, (he/she) was in (a public place/ [or] a place open to the public [or to public view]);**
4. **At the time the defendant engaged in the conduct, someone else who might have been offended was present;**

AND

5. **The defendant knew or reasonably should have known that another person who might have been offended by (his/her) conduct was present.**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4 [181 Cal.Rptr. 723].
- Willfully Defined. Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].

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- "Lewd" and "Dissolute" Synonymous. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 67–68.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.20 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

RELATED ISSUES

Need Not Prove Someone Was Offended

"It is not the burden of the prosecution to prove that the observer was in fact offended by the conduct but only that the conduct was such that defendant should know that the observer 'may be offended.' " (*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 11 [181 Cal.Rptr. 723].)

Does Not Apply to Live Theater Performance

"It seems evident from the foregoing that the vagrancy law, [Penal Code] section 647, subdivision (a), was not intended to apply to live performances in a theater before an audience." (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 827–828 [83 Cal.Rptr. 819, 464 P.2d 483].)

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1162. Soliciting Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count _____] with soliciting another person to engage in lewd conduct in public [in violation of Penal Code section 647(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant requested [or _____ <*insert other synonyms for "solicit," as appropriate*>] that another person engage in the touching of ((his/her) own/ [or] another person's) (genitals[,]/ [or] buttocks[,]/ [or] female breast);**
2. **The defendant requested that the other person engage in the requested conduct in (a public place/ [or] a place open to the public [or in public view]);**
3. **When the defendant made the request, (he/she) was in (a public place/ [or] a place open to the public [or in public view]);**
4. **The defendant intended for the conduct to occur in (a public place/ [or] a place open to the public [or in public view]);**
5. **When the defendant made the request, (he/she) did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**

[AND]

6. **The defendant knew or reasonably should have known that someone was likely to be present who could be offended by the requested conduct(;/.)**

<Give element 7 when instructing that person solicited must receive message; see Bench Notes.>

[AND

7. **The other person received the communication containing the request.]**

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised August 2006, December 2008, September 2017

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 7.

AUTHORITY

- Elements. Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 8–9 [181 Cal.Rptr. 723].
- Willfully Defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Likely Defined. *People v. Lake* (2007) 156 Cal.App.4th Supp. 1 [67 Cal.Rptr.3d 452].
- Solicitation Requires Specific Intent. *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134].
- Solicitation Defined. *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication. *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- "Lewd" and "Dissolute" Synonymous. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined. *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 67–68.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order* § 144.20 (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

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RELATED ISSUES

See the Related Issues sections of CALCRIM No. 1161, *Lewd Conduct in Public* and CALCRIM No. 441, *Solicitation: Elements*.

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2100. Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153(a), (f), (g))

The defendant is charged [in Count _____] with causing injury to another person while (driving a vehicle/operating a vessel) under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug) [in violation of Vehicle Code section 23153(a)/(f)/(g)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (drove a vehicle/operated a vessel);**
2. **When (he/she) (drove a vehicle/operated a vessel), the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug);**
3. **While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to (drive a vehicle/operate a vessel) with the caution of a sober person, using ordinary care, under similar circumstances.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to (drive a vehicle/ operate a vessel) as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would (drive a vehicle/ operate a vessel) under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that

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the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.

[The People allege that the defendant committed the following illegal act[s]: _____ <*list name[s] of offense[s]*>.

To decide whether the defendant committed _____ <*list name[s] of offense[s]*>, please refer to the separate instructions that I (will give/ have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/_____ <*insert other duty or duties alleged*>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<*Alternative A—unanimity required; see Bench Notes*>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<*Alternative B—unanimity not required; see Bench Notes*>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor.

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However, it need not be the only factor that causes the injury.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to (drive a vehicle/operate a vessel).]

New January 2006; Revised June 2007, April 2008, December 2008, August 2015, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity

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instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is no evidence that the defendant's blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else

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also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington*, *supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements. Veh. Code, § 23153(a), (f), (g); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- Alcoholic Beverage Defined. Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined. Veh. Code, § 312.
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Under the Influence Defined. *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].

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- Must Instruct on Elements of Predicate Offense. *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care. Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation. *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense. Veh. Code, § 23630.
- Unanimity Instruction. *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272–277.

2 Witkin, California Evidence (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence § 56.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent. Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].
- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence. *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].
- Violations of Vehicle Code section 23153(a), are not lesser included offenses of Vehicle Code section 23153(f) [now 23153(g)]. *People v. Cady* (2016) 7 Cal.App.5th 134, 145–146 [212 Cal.Rptr.3d 319].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

"[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence." (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33

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Cal.Rptr.2d 641] [italics in original]; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law

The term " 'any act forbidden by law' . . . refers to acts forbidden by the Vehicle Code . . . ." (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not committed "when" defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

"In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated." (Veh. Code, § 23153(c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) "[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence." (*People v. Oyaas*, *supra*, 173 Cal.App.3d at p. 669.) "[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle." (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

"In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving." (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when "a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident." (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

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2110. Driving Under the Influence (Veh. Code, § 23152(a), (f), (g))

The defendant is charged [in Count _____] with driving under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug) [in violation of Vehicle Code section 23152(a)/(f)/(g)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant drove a vehicle;**

AND

2. **When (he/she) drove, the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug).**

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <*insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer*>.]]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or

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not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]

New January 2006; Revised June 2007, April 2008, August 2015, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington*, *supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent" if there is no substantial evidence that the defendant's blood

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alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating any test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that "it is not a defense that something else also impaired (his/her) ability to drive" if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements. Veh. Code, § 23152(a), (f), (g).
- Alcoholic Beverage Defined. Veh. Code, § 109; Bus. & Prof. Code, § 23004.
- Drug Defined. Veh. Code, § 312.

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- Driving. *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Presumptions. Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference. *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Under the Influence Defined. *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Manner of Driving. *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [282 Cal.Rptr. 170]; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Legal Entitlement to Use Drug Not a Defense. Veh. Code, § 23630.
- Prior Convictions. *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272–277.

2 Witkin, California Evidence (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence § 56.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

- Attempted Driving Under the Influence. Pen. Code, § 664; Veh. Code, § 23152(a); *People v. Garcia* (1989) 214 Cal.App.3d Supp. 1, 3–4 [262 Cal.Rptr. 915].

RELATED ISSUES

Driving

"[S]ection 23152 requires proof of volitional movement of a vehicle." (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].) However, the movement may be slight. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [229 Cal.Rptr. 310]; *Henslee v. Dept. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450–453 [214 Cal.Rptr. 249].) Further, driving may be established through circumstantial evidence. (*Mercer*, *supra*, 53 Cal.3d at p. 770; *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [222 Cal.Rptr. 540] [sufficient

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evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver's seat with the vehicle's engine running].) See CALCRIM No. 2241, *Driver and Driving Defined*.

PAS Test Results

The results of a preliminary alcohol screening (PAS) test "are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator . . . ." (*People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203].)

Presumption Arising From Test Results—Timing

Unlike the statute on driving with a blood alcohol level of 0.08 percent or more, the statute permitting the jury to presume that the defendant was under the influence if he or she had a blood alcohol level of 0.08 percent or more does not contain a time limit for administering the test. (Veh. Code, § 23610; *People v. Schrieber* (1975) 45 Cal.App.3d 917, 922 [119 Cal.Rptr. 812].) However, the court in *Schrieber*, *supra*, noted that the mandatory testing statute provides that "the test must be incidental to both the offense and to the arrest and . . . no substantial time [should] elapse . . . between the offense and the arrest." (*Id.* at p. 921.)

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2300. Sale, Transportation for Sale, etc., of Controlled Substance (Health & Saf. Code, §§ 11352, 11379)

The defendant is charged [in Count _____] with (selling/furnishing/administering/giving away/transporting for sale/importing) _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (sold/furnished/administered/gave away/transported for sale/imported into California) a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**

[AND]

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of paragraph 4A.>

4A. The controlled substance was _____ <*insert type of controlled substance*>(;/.)

4B. The controlled substance was an analog of _____ <*insert type of controlled substance*>(;/.)

<Give element 5 when instructing on usable amount; see Bench Notes.>

[AND

5. **The controlled substance was in a usable amount.]**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*>. An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

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[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* for sale if he or she carries or moves something from one location to another for sale, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported for sale/imported).]

[A person does not have to actually hold or touch something to (sell/ furnish/administer/transport it for sale/import/give it away) [it]. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

New January 2006; Revised October 2010, February 2014, August 2014, February 2016, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Transportation of a controlled substance requires a "usable amount." (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11352, 11379.
- Administering. Health & Saf. Code, § 11002.

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- Administering Does Not Include Self-Administering. *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount. *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.
- Intent Requirement for Transportation for Sale. *People v. Lua* (2017) 10 Cal.App.5th 1004, 1014–1016 [217 Cal.Rptr.3d 23].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 115–123.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession Is Not a Lesser Included Offense of This Crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983–984 [64 Cal.Rptr.3d 926]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)
- Possession for Sale Is Not a Lesser Included Offense of This Crime. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)

Note: In reviewing the appropriateness of sentencing enhancements, *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

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RELATED ISSUES

Transportation

Transportation does not require personal possession by the defendant. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129] [abrogated in part by statute on other grounds].) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

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2301. Offering to Sell, Transport for Sale, etc., a Controlled Substance (Health & Saf. Code, §§ 11352, 11379)

The defendant is charged [in Count _____] with offering to (sell/furnish/administer/give away/transport for sale/import) _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____<*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] offered to (sell/furnish/administer/give away/transport for sale/import into California) a controlled substance;**
2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away/transport for sale/import) the controlled substance.**

AND

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of paragraph 3A.>

3A. The controlled substance was _____ *<insert type of controlled substance>.*

3B. The controlled substance was an analog of _____ *<insert type of controlled substance>.*

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ *<insert name of analog drug>* **is an analog of _____** *<insert type of controlled substance>*. **An analog of a controlled substance:**

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* for sale if he or she carries or moves something

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from one location to another, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[The People do not need to prove that the defendant actually possessed the controlled substance.]

New January 2006; Revised February 2014, August 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11352, 11379.
- Administering. Health & Saf. Code, § 11002.
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.
- Intent Requirement for Transportation for Sale. *People v. Lua* (2017) 10 Cal.App.5th 1004, 1014–1016 [217 Cal.Rptr.3d 23].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 85–113, 147–151.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [g]–[j] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of Controlled Substance. Health & Saf. Code, §§ 11350, 11377; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included]; but see *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298] [finding a lesser included offense on factual but not legal basis].
- Possession for Sale. Health & Saf. Code, §§ 11351, 11378; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included] but see *People v. Tinajero*

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(1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298] [finding a lesser included offense on factual but not legal basis].

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

Transportation for Sale

Effective January 1, 2014, the definition of "transportation" is limited to transportation for sale for the purposes of section 11352. Health & Saf. Code, § 11352(c).

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2302. Possession for Sale of Controlled Substance (Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5)

The defendant is charged [in Count _____] with possession for sale of _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **When the defendant possessed the controlled substance, (he/she) intended (to sell it/ [or] that someone else sell it);**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 5B and the definition of analog substance below instead of paragraph 5A.>

5A. The controlled substance was _____ <*insert type of controlled substance*>;

5B. The controlled substance was an analog of _____ <*insert type of controlled substance*>;

AND

6. **The controlled substance was in a usable amount.**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*>. An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

***Selling* for the purpose of this instruction means exchanging _____ <*insert type of controlled substance*> for money, services, or anything of value.**

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A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006; Revised October 2010, February 2014, February 2016, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- This Instruction Is Correct. *People v. Montero* (2007) 155 Cal.App.4th 1170, 1177 [66 Cal.Rptr.3d 668].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.
- Specific Intent to Sell Personally or That Another Will Sell Required. *People*

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v. Parra (1999) 70 Cal.App.4th 222, 226 [8 Cal.Rptr.2d 541] and *People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1732, fn. 4 [32 Cal.Rptr.2d 288].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 87–88, 101.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a]–[c], [e], [h] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance. *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458 [204 Cal.Rptr. 465].
- Possession of Cocaine for Sale Is Not Necessarily Included Offense of Selling Cocaine Base. *People v. Murphy* (2005) 134 Cal.App.4th 1504, 1508 [36 Cal.Rptr.3d 872]).

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2303. Possession of Controlled Substance While Armed With Firearm (Health & Saf. Code, § 11370.1)

The defendant is charged [in Count _____] with possessing _____ <*insert type of controlled substance specified in Health & Saf. Code, § 11370.1*>, a controlled substance, while armed with a firearm [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of paragraph 4A.>

4A. The controlled substance was _____ <*insert type of controlled substance*>;

4B. The controlled substance was an analog of _____ <*insert type of controlled substance*>;

5. **The controlled substance was in a usable amount;**
6. **While possessing that controlled substance, the defendant had a loaded, operable firearm available for immediate offensive or defensive use;**

AND

7. **The defendant knew that (he/she) had the firearm available for immediate offensive or defensive use.**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*>. An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous

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system substantially similar to or greater than the effect of a controlled substance.]]

Knowledge that an available firearm is loaded and operable is not required.

A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion.

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006; Revised August 2006, October 2010, August 2013, February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

- Elements. Health & Saf. Code, § 11370.1; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge of Controlled Substance. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Loaded Firearm. *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].

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- Knowledge of Presence of Firearm. *People v. Singh* (2004) 119 Cal.App.4th 905, 912–913 [14 Cal.Rptr.3d 769].
- Knowledge That Firearm is Loaded or Operable Not Required. *People v. Heath* (2005) 134 Cal.App.4th 490, 498 [36 Cal.Rptr.3d 66].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §100.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][f]; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [3][b] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession of a Controlled Substance Not a Lesser Included Offense. *People v. Sosa* (2012) 210 Cal.App.4th 946, 949–950 [148 Cal.Rptr.3d 826]; Health & Saf. Code, §§ 11350, 11377.

See also Firearm Possession instructions, CALCRIM Nos. 2510 to 2530.

RELATED ISSUES

Loaded Firearm

"Under the commonly understood meaning of the term 'loaded,' a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position." (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

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2304. Simple Possession of Controlled Substance (Health & Saf. Code, §§ 11350, 11377)

The defendant is charged [in Count _____] with possessing _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of paragraph 4A.>

4A. The controlled substance was _____ <*insert type of controlled substance*>**;**

4B. The controlled substance was an analog of _____ <*insert type of controlled substance*>

AND

5. **The controlled substance was in a usable amount.**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> **is an analog of _____** <*insert type of controlled substance*>**. An analog of a controlled substance:**

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

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[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something, to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

<Defense: Prescription>

[The defendant is not guilty of possessing _____ <*insert type of controlled substance*> if (he/she) had a valid, written prescription for that substance from a physician, dentist, podiatrist, [naturopathic doctor], or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]

New January 2006; Revised August 2006, October 2010, February 2014, August 2015, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision (c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial,* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

Defenses—Instructional Duty

The prescription defense is codified in Health and Safety Code sections 11350 and 11377. It is not available as a defense to possession of all controlled substances. The defendant need only raise a reasonable doubt about whether his or her possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to give the bracketed paragraph on the defense.

A recent amendment to section 11150 includes a naturopathic doctor in the category of those who may furnish or order certain controlled substances, so that bracketed option should be included in this instruction if substantial evidence supports it.

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AUTHORITY

- Elements. Health & Saf. Code, §§ 11350, 11377; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 97–114.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[d], [2][b] (Matthew Bender).

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2306. Possession of Controlled Substance with Intent to Commit Sexual Assault (Health & Saf. Code, §§ 11350.5, 11377.5)

The defendant is charged [in Count _____] with possession of _____ <*insert type of controlled substance from sections 11056(c)(11), (g), 11054(e)(3); or 11057(d)(13) of the Health and Safety Code*>, a controlled substance, with intent to commit _____ <*insert description of alleged target crime or crimes from sections 243.4, 261, 262, 286, 288a, or 289 of the Penal Code*>, [in violation of Health and Safety Code section[s] (11350.5[,]/ [and/or] 11377.5)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a controlled substance;**
2. **The defendant knew of its presence;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **When the defendant possessed the controlled substance, (he/she) intended to use it to commit_____<*insert description of alleged target crime or crimes from sections 243.4, 261, 262, 286, 288a, or 289 of the Penal Code*>;**
5. **The controlled substance was _____ <*insert type of controlled substance*>;**
6. **The controlled substance was in a usable amount.**

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

New September 2017

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BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court must also give the appropriate instructions on the target sexual offense or offenses in element 4.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11350.5, 11377.5.
- Prohibited Controlled Substances. Health & Saf. Code, §§ 11054(e)(3), 11056(c)(11) or (g); 11057(d)(13).
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 105, 106.

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 1–69.

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2380. Sale, Furnishing, etc., of Controlled Substance to Minor (Health & Saf. Code, §§ 11353, 11354, 11380(a))

The defendant is charged [in Count _____] with (selling/furnishing/administering/giving away) _____ <*insert type of controlled substance*>, a controlled substance, to someone under 18 years of age [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (sold/furnished/administered/gave away) a controlled substance to _____ <*insert name of alleged recipient*>;**
2. **The defendant knew of the presence of the controlled substance;**
3. **The defendant knew of the substance's nature or character as a controlled substance;**
4. **At that time, the defendant was 18 years of age or older;**
5. **At that time, _____ <*insert name of alleged recipient*> was under 18 years of age;**

[AND]

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 6B and the definition of analog substance below instead of paragraph 6A.>

6A. The controlled substance was _____ <*insert type of controlled substance*>(;/.)

6B. The controlled substance was an analog of _____ <*insert type of controlled substance*>(;/.)

<Give element 7 when instructing on usable amount; see Bench Notes.>

[AND

7. **The controlled substance was in a usable amount.]**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*>. An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

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[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

[*Selling* for the purpose of this instruction means exchanging _____ <*insert type of controlled substance*> for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away).]

[A person does not have to actually hold or touch something to (sell it/ furnish it/administer it/give it away). It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

New January 2006; Revised October 2010, February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not use bracketed element 7 or the definition of usable amount. There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) The bracketed element 7 and the definition of usable amount are provided here for the court to use at its discretion.

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 4, the court should replace "18 years of age or older" with "under 18 years of age."

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Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18. *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Administering. Health & Saf. Code, § 11002.
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount. *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 124–126.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.02, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a]–[c], [h], [i], [3][a], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Sale to Person Not a Minor. Health & Saf. Code, §§ 11352, 11379.
- Simple Possession of Controlled Substance. Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios*, *supra*, 22 Cal.App.4th at p. 1524 [lesser related offense but not necessarily included].

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- Possession for Sale of Controlled Substance. Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero*, *supra*, 19 Cal.App.4th at p. 1547; but see *People v. Peregrina-Larios*, *supra*, 22 Cal.App.4th at p. 1524 [lesser related offense but not necessarily included].

RELATED ISSUES

No Defense of Good Faith Belief Over 18

"The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations omitted.]" (*People v. Williams*, *supra*, 233 Cal.App.3d at pp. 410–411.)

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2381. Offering to Sell, Furnish, etc., Controlled Substance to Minor (Health & Saf. Code, §§ 11353, 11354, 11380(a))

The defendant is charged [in Count _____] with offering to (sell/furnish/administer/give away) _____ <*insert type of controlled substance*>, a controlled substance, to someone under 18 years of age [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] offered to (sell/furnish/administer/give away) a controlled substance to _____ <*insert name of alleged recipient*>;**
2. **When the defendant made the offer, (he/she) intended to (sell/furnish/administer/give away) the controlled substance;**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of paragraph 3A.>

3A. The controlled substance was _____ <*insert type of controlled substance*>;

3B. The controlled substance was an analog of _____ <*insert type of controlled substance*>;

4. **At that time, the defendant was 18 years of age or older;**

AND

5. **At that time, _____ <*insert name of alleged recipient*> was under 18 years of age.**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*>. An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

[*Selling* for the purpose of this instruction means exchanging a

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controlled substance for money, services, or anything of value.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

New January 2006; Revised February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18. *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Specific Intent. *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Administering. Health & Saf. Code, § 11002.
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 124–126.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

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6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [h]–[j], [3][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Offering to Sell to Person Not a Minor. Health & Saf. Code, §§ 11352, 11360, 11379.
- Simple Possession of Controlled Substance. Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547 [24 Cal.Rptr.2d 298]; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].
- Possession for Sale of Controlled Substance. Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero*, *supra*, 19 Cal.App.4th at p. 1547; but see *People v. Peregrina-Larios*, *supra*, 22 Cal.App.4th at p. 1524 [lesser related offense but not necessarily included].

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469 [30 Cal.Rptr. 329, 381 P.2d 1]; *People v. Brown* (1960) 55 Cal.2d 64, 68 [9 Cal.Rptr. 816, 357 P.2d 1072].)

See the Related Issues section to CALCRIM No. 2380, *Sale, Furnishing, etc., of Controlled Substance to Minor*.

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2382. Employment of Minor to Sell Controlled Substance (Health & Saf. Code, §§ 11353, 11354)

The defendant is charged [in Count _____] with (hiring/employing/using) someone under 18 years of age to (transport/carry/sell/give away/prepare for sale/peddle) _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] (hired/employed/used) _____ <*insert name of person hired*>;**
2. **_____ <*insert name of person hired*> was (hired/employed/used) to (transport/carry/sell/give away/prepare for sale/peddle) a controlled substance;**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of paragraph 3A.>

3A. The controlled substance was _____ <*insert type of controlled substance*>;

3B. The controlled substance was an analog of _____ <*insert type of controlled substance*>;

4. **At that time, the defendant was 18 years of age or older;**
5. **At that time, _____ <*insert name of person hired*> was under 18 years of age;**

AND

6. **The defendant knew of the substance's nature or character as a controlled substance.**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*> . An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant,

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depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* for sale if he or she carries or moves something from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/carried/sold/given away/prepared for sale/peddled), only that (he/she) was aware that it was a controlled substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

New January 2006; Revised February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354.
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th 353 at p. 362, fn. 5.

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 124–126.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.12, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [g], [h], [3][a], [b], [c] (Matthew Bender).

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2383. Use of Minor as Agent to Violate Controlled Substance Law (Health & Saf. Code, § 11380(a))

The defendant is charged [in Count _____] with using someone under 18 years of age as an agent to (transport/sell/give away/possess/possess for sale) _____ <*insert type of controlled substance*>, a controlled substance [in violation of Health and Safety Code section 11380(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant used _____ <*insert name of person hired*> as an agent;**
2. **_____ <*insert name of person hired*> was used by the defendant to (transport/sell/give away/possess/possess for sale) a controlled substance;**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 3B and the definition of analog substance below instead of paragraph 3A.>

3A. The controlled substance was _____ <*insert type of controlled substance*>;

3B. The controlled substance was an analog of _____ <*insert type of controlled substance*>;

4. **At that time, the defendant was 18 years of age or older;**
5. **At that time, _____ <*insert name of person hired*> was under 18 years of age;**

AND

6. **The defendant knew of the substance's nature or character as a controlled substance.**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*>. An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous

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system substantially similar to or greater than the effect of a controlled substance.]]

An *agent* is a person who is authorized to act for the defendant in dealings with other people.

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* for sale if he or she carries or moves something from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant knew which specific controlled substance was to be (transported/sold/given away/possessed/possessed for sale), only that (he/she) was aware that it was a controlled substance.]

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

New January 2006; Revised February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements. Health & Saf. Code, § 11380(a).
- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge. *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Agent. Civ. Code, § 2295.
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 124–126.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.12, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b], [d], [e], [g], [h], [3][a] (Matthew Bender).

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2384. Inducing Minor to Violate Controlled Substance Laws (Health & Saf. Code, §§ 11353, 11354, 11380(a))

The defendant is charged [in Count _____] with (soliciting/inducing/encouraging/intimidating) someone under 18 years of age to commit the crime of _____ <*insert description of Health and Safety Code violation alleged*> [in violation of _____ <*insert appropriate code section[s]*>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully (solicited/induced/encouraged/intimidated) _____ <*insert name of person solicited*> to commit the crime of _____ <*insert description of Health and Safety Code violation alleged*> [of] a controlled substance;**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 2B and the definition of analog substance below instead of paragraph 2A.>

2A. The controlled substance was _____ <*insert type of controlled substance*>;

2B. The controlled substance was an analog of _____ <*insert type of controlled substance*>;

3. **The defendant intended that _____ <*insert name of person solicited*> would commit that crime;**

4. **At that time, the defendant was 18 years of age or older;**

AND

5. **At that time, _____ <*insert name of person solicited*> was under 18 years of age.**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> is an analog of _____ <*insert type of controlled substance*>. An analog of a controlled substance:

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

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To decide whether the defendant intended that _____ <*insert name of person solicited*> would commit the crime of _____ <*insert description of Health and Safety Code violation alleged*>, please refer to the separate instructions that I (will give/have given) you on that crime.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

<*Defense: Good Faith Belief Over 18*>

[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ <*insert name of person solicited*> was 18 years of age or older. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____ <*insert name of person solicited*> was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Where indicated in the instruction, insert a description of the Health and Safety Code violation allegedly solicited. For example, "the crime of possession for sale of cocaine," or "the crime of sale of marijuana."

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

The court has a **sua sponte** duty to give the final bracketed paragraph if there is substantial evidence supporting the defense that the defendant had a reasonable and good faith belief that the person was over 18 years of age. (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11353, 11354, 11380(a).

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- Age of Defendant Element of Offense. *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting. *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 124, 125.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.06[1] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.12, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [3][a] (Matthew Bender).

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2748. Possession of Controlled Substance or Paraphernalia in Penal Institution (Pen. Code, § 4573.6)

The defendant is charged [in Count _____] with possessing (_____ <*insert type of controlled substance*>, a controlled substance/an object intended for use to inject or consume controlled substances), in a penal institution [in violation of Penal Code section 4573.6].

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant [unlawfully] possessed (a controlled substance/an object intended for use to inject or consume controlled substances) in a penal institution [or on the grounds of a penal institution];**
2. **The defendant knew of the (substance's/object's) presence;**

[AND]

3. **The defendant knew (of the substance's nature or character as a controlled substance/that the object was intended to be used for injecting or consuming controlled substances)(;/.)**

<Give elements 4 and 5 if defendant is charged with possession of a controlled substance, not possession of paraphernalia.>

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4B and the definition of analog substance below instead of paragraph 4A.>

[4A. The controlled substance was _____ <*insert type of controlled substance*>**;**

4B. The controlled substance was an analog of _____ <*insert type of controlled substance*>**;**

AND

5. **The controlled substance was a usable amount.]**

[In order to prove that the defendant is guilty of this crime, the People must prove that _____ <*insert name of analog drug*> **is an analog of _____** <*insert type of controlled substance*>. **An analog of a controlled substance:**

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

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[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

A *penal institution* is a (state prison[,]/ [or] prison camp or farm[,]/ [or] (county/ [or] city) jail[,]/ [or] county road camp[,]/ [or] county farm[,]/ [or] place where prisoners of the state prison are located under the custody of prison officials, officers, or employees/ [or] place where prisoners or inmates are being held under the custody of a (sheriff[,]/ [or] chief of police[,]/ [or] peace officer[,]/ [or] probation officer).

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

[An object is *intended to be used* for injecting or consuming controlled substances if the defendant (1) actually intended it to be so used, or (2) should have known, based on the item's objective features, that it was intended for such use.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

[The People allege that the defendant possessed the following items: _____ <*insert description of each controlled substance or all paraphernalia when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these items and you all agree on which item (he/she) possessed.]

<A. Defense: Prescription>

[The defendant is not guilty of unlawfully possessing _____ <*insert type of controlled substance*> if (he/she) had a valid prescription for that substance written by a physician, dentist, podiatrist, or veterinarian licensed to practice in California. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid prescription. If the People have not met this burden, you must find the defendant not guilty of possessing a controlled substance.]

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<B. Defense: Conduct Authorized>

[The defendant is not guilty of this offense if (he/she) was authorized to possess the (substance/item) by (the rules of the (Department of Corrections/prison/jail/institution/camp/farm/place)/ [or] the specific authorization of the (warden[,]/ [or] superintendent[,]/ [or] jailer[,]/ [or] [other] person in charge of the (prison/jail/institution/camp/farm/place)). The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess the (substance/item). If the People have not met this burden, you must find the defendant not guilty of this offense.]

New January 2006; Revised October 2010, February 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the defendant is charged with possessing a controlled substance, give elements 1 through 5. If the defendant is charged with possession of paraphernalia, give elements 1 through 3 only.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]; *People v. Rowland* (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with "The People allege that the defendant possessed," inserting the items alleged.

Give the bracketed sentence defining "intended to be used" if there is an issue over whether the object allegedly possessed by the defendant was drug paraphernalia. (See *People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561].)

The prescription defense is codified in Health & Safety Code sections 11350 and 11377. This defense does apply to a charge of possession of a controlled substance in a penal institution. (*People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].) The defendant need only raise a reasonable doubt about whether his possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence of a prescription, give the bracketed "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Prescription."

If there is sufficient evidence that the defendant was authorized to possess the substance or item, give the bracketed word "unlawfully" in element 1 and the bracketed paragraph headed "Defense: Conduct Authorized." (*People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas* (1997) 53 Cal.App.4th 240, 245–246 [61 Cal.Rptr.2d 583].)

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AUTHORITY

- Elements. Pen. Code, § 4573.6; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717]; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948 [173 Cal.Rptr. 688].
- Knowledge. *People v. Carrasco*, *supra*, 118 Cal.App.3d at pp. 944–947.
- Usable Amount. *People v. Carrasco*, *supra*, 118 Cal.App.3d at p. 948.
- Prescription Defense. Health & Saf. Code, §§ 11350, 11377.
- Prescription. Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions. Health & Saf. Code, § 11150.
- Prescription Defense Applies. *People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].
- Authorization Is Affirmative Defense. *People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas*, *supra*, 53 Cal.App.4th at pp. 245–246.
- Jail Defined. *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution. *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- "Adjacent to" and "Grounds" Not Vague. *People v. Seale*, *supra*, 274 Cal.App.2d at pp. 114–115.
- Constructive vs. Actual Possession. *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Definition of Analog Controlled Substance. Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. *People v. Davis*, *supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 161.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* § 85.02[2][a][i] (Matthew Bender).

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 94, *Prisoners' Rights,* § 94.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01 (Matthew Bender).

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RELATED ISSUES

Inmate Transferred to Mental Hospital

A prison inmate transferred to a mental hospital for treatment under Penal Code section 2684 is not "under the custody of prison officials." (*People v. Superior Court (Ortiz)* (2004) 115 Cal.App.4th 995, 1002 [9 Cal.Rptr.3d 745].) However, the inmate is "held under custody by peace officers within the facility." (*Id.* at p. 1003.) Thus, Penal Code section 4573.6 does apply. *(Ibid.)*

Use of Controlled Substance Insufficient to Prove Possession

" '[*P*]*ossession*,' as used in that section, does not mean 'use' and mere evidence of use (or being under the influence) of a proscribed substance cannot circumstantially prove its '*possession*.' " (*People v. Spann* (1986) 187 Cal.App.3d 400, 408 [232 Cal.Rptr. 31] [italics in original]; see also *People v. Carrasco*, *supra*, 118 Cal.App.3d at p. 947.)

Posting of Prohibition

Penal Code section 4573.6 requires that its "prohibitions and sanctions" be posted on the grounds of the penal institution. (Pen. Code, § 4573.6.) However, that requirement is not an element of the offense, and the prosecution is not required to prove compliance. (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 389 [60 Cal.Rptr.2d 561]; *People v. Cardenas*, *supra*, 53 Cal.App.4th at p. 246.)

Possession of Multiple Items at One Time

"[C]ontemporaneous possession in a state prison of two or more discrete controlled substances . . . at the same location constitutes but one offense under Penal Code section 4573.6." (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1067 [69 Cal.Rptr.2d 563].)

Administrative Punishment Does Not Bar Criminal Action

"The protection against multiple punishment afforded by the Double Jeopardy Clause . . . is not implicated by prior prison disciplinary proceedings . . . ." (*Taylor v. Hamlet* (N.D. Cal. 2003) 2003 U.S. Dist. LEXIS 19451; see also *People v. Ford* (1959) 175 Cal.App.2d 37, 39 [345 P.2d 354] [Pen. Code, § 654 not implicated].)

Medical Use of Marijuana

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a defendant charged with violating Penal Code section 4573.6. (*Taylor v. Hamlet*, *supra*, 2003 U.S. Dist. LEXIS 19451.) However, the common law defense of medical necessity may be available. *(Ibid.)*

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3145. Personally Used Deadly Weapon (Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3)

If you find the defendant guilty of the crime[s] charged in Count[s] _____ [,] [or of attempting to commit (that/those) crime[s]][or the lesser crime[s] of _____ <*insert name[s] of alleged lesser offense[s]*>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally used a deadly [or dangerous] weapon during the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

A *deadly [or dangerous] weapon* is any object, instrument, or weapon that is inherently deadly [or dangerous] or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

[In deciding whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed[,] [and] [where the person who possessed the object was going][,] [and] [whether the object was changed from its standard form] [and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]]

***Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.**

Someone *personally uses* a deadly [or dangerous] weapon if he or she intentionally [does any of the following]:

[1. Displays the weapon in a menacing manner(./;)]

[OR]

[(2/1). Hits someone with the weapon(./;)]

[OR]

[(3/2). Fires the weapon(./;)]

[OR

(4/3). _____ <*insert description of use*>].

<*If there is an issue in the case over whether the defendant used the weapon "in the commission of" the offense, see Bench Notes.*>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find

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that the allegation has not been proved.

New January 2006; Revised June 2007, February 2013, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Give all of the bracketed "or dangerous" phrases if the enhancement charged uses both the words "deadly" and "dangerous" to describe the weapon. (Pen. Code, §§ 667.61, 1192.7(c)(23), 12022(b).) Do not give these bracketed phrases if the enhancement uses only the word "deadly." (Pen. Code, § 12022.3.)

Give the bracketed portion that begins with "In deciding whether" if the object is not a weapon as a matter of law and is capable of innocent uses. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].)

In the definition of "personally uses," the court may give the bracketed item 3 if the case involves an object that may be "fired."

If the case involves an issue of whether the defendant used the weapon "in the commission of" the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- Enhancements. Pen. Code, §§ 667.61(e)(3), 1192.7(c)(23), 12022(b)(1) & (2), 12022.3.
- Deadly Weapon Defined. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1086–1087 [130 Cal.Rptr.2d 717].
- Objects With Innocent Uses. *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029 [68 Cal.Rptr.2d 655, 945 P.2d 1204]; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1573–1574 [58 Cal.Rptr.2d 545].
- Personally Uses. *People v. Bland* (1995) 10 Cal.4th 991, 997 [43 Cal.Rptr.2d 77, 898 P.2d 391]; *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319–1320 [45 Cal.Rptr.2d 602]; see also Pen. Code, § 1203.06(b)(2).
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

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- May Not Receive Enhancement for Both Using and Being Armed With One Weapon. *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175–176 [156 Cal.Rptr. 386].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 40.

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 356–357, 361–369.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.30, 91.81[1][d] (Matthew Bender).

RELATED ISSUES

No Duty to Instruct on "Lesser Included Enhancements"

"[A] trial court's sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on 'lesser included enhancements.' " (*People v. Majors* (1998) 18 Cal.4th 385, 411 [75 Cal.Rptr.2d 684, 956 P.2d 1137].) Thus, if the defendant is charged with an enhancement for use of a weapon, the court does not need to instruct on an enhancement for being armed.

Weapon Displayed Before Felony Committed

Where a weapon is displayed initially and the underlying crime is committed some time after the initial display, the jury may conclude that the defendant used the weapon in the commission of the offense if the display of the weapon was "at least . . . an aid in completing an essential element of the subsequent crimes . . . ." (*People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705].)

Weapon Used Did Not Cause Death

In *People v. Lerma* (1996) 42 Cal.App.4th 1221, 1224 [50 Cal.Rptr.2d 580], the defendant stabbed the victim and then kicked him. The coroner testified that the victim died as a result of blunt trauma to the head and that the knife wounds were not life threatening. *(Ibid.)* The court upheld the finding that the defendant had used a knife during the murder even though the weapon was not the cause of death. (*Id.* at p. 1226.) The court held that in order for a weapon to be used in the commission of the crime, there must be "a nexus between the offense and the item at issue, [such] that the item was an instrumentality of the crime." *(Ibid.)* [ellipsis and brackets omitted] Here, the court found that "[t]he knife was instrumental to the consummation of the murder and was used to advantage." *(Ibid.)*

"One Strike" Law and Use Enhancement

Where the defendant's use of a weapon has been used as a basis for applying the "one strike" law for sex offenses, the defendant may not also receive a separate

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enhancement for use of a weapon in commission of the same offense. (*People v. Mancebo* (2002) 27 Cal.4th 735, 754 [117 Cal.Rptr.2d 550, 41 P.3d 556].)

Assault and Use of Deadly Weapon Enhancement

"A conviction [for assault with a deadly weapon or by means of force likely to cause great bodily injury] under [Penal Code] section 245, subdivision (a)(1) cannot be enhanced pursuant to section 12022, subdivision (b)." (*People v. Summersville* (1995) 34 Cal.App.4th 1062, 1070 [40 Cal.Rptr.2d 683].)

Robbery and Use of Deadly Weapon Enhancement

A defendant may be convicted and sentenced for both robbery and an enhancement for use of a deadly weapon during the robbery. (*In re Michael L.* (1985) 39 Cal.3d 81, 88 [216 Cal.Rptr. 140, 702 P.2d 222].)

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3183. Sex Offenses: Sentencing Factors—Administered Controlled Substance (Pen. Code, § 667.61(e)(6))

If you find the defendant guilty of the crime[s] charged in Count[s] _____ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant administered a controlled substance to _____ <*insert name[s] of alleged victim[s]*> during the commission of (that/those) crime[s]. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]

To prove this allegation, the People must prove that:

1. **In the commission of _____ <*insert sex offense[s] from Pen. Code, § 667.61(c)*>, the defendant administered _____ <*insert controlled substance from Health & Saf. Code, §§ 11054–11058*> to _____ <*insert name[s] of alleged victim[s]*>;**

AND

2. **The defendant did so for the purpose of committing _____ <*insert felony alleged*>.**

A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.

<If there is an issue in the case as to whether the defendant acted "in the commission of" the offense, see Bench Notes.>

The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

If there is an issue in the case as to whether the defendant acted "in the commission" of the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25

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Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705] [weapon used before elements of felony committed]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

AUTHORITY

- One-Strike Sex Offense Statute—Administered Controlled Substance. Pen. Code, § 667.61(e)(6).
- Factors Must Be Pleaded and Proved. Pen. Code, § 667.61(j); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].
- Elements of Enhancement. Pen. Code, § 12022.75.
- Administering. Health & Saf. Code, § 11002.
- "In Commission of" Felony. *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 574–578.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, § 727.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* §§ 91.42, 91.102[2][a][ii] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 13:9 (The Rutter Group).

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3404. Accident (Pen. Code, § 195)

<Give this paragraph when instructing on general or specific intent crimes>

[The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]

<Give this paragraph when instructing on criminal negligence crimes>

[The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted [or failed to act] accidentally without criminal negligence. You may not find the defendant guilty of _____ <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with criminal negligence. *Criminal negligence* is defined in another instruction.]

New January 2006; Revised April 2008, August 2012, September 2017

BENCH NOTES

Instructional Duty

The court has no **sua sponte** duty to instruct on accident. (*People v. Anderson* (2011) 51 Cal.4th 989, 997–998 [125 Cal.Rptr.3d 408].)

Related Instructions

If murder is charged, see CALCRIM No. 510, *Excusable Homicide: Accidental*.

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 26(5), 195.
- Burden of Proof. *People v. Black* (1951) 103 Cal.App.2d 69, 79 [229 P.2d 61]; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1154–1155 [10 Cal.Rptr.2d 217].
- Misfortune as Accident. *People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, § 273.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.01[5] (Matthew Bender).

RELATED ISSUES

Misfortune Defined

" 'Misfortune' when applied to a criminal act is analogous [to] the word 'misadventure' and bears the connotation of accident while doing a lawful act."

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(*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308 [265 P.2d 69].)

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3414. Coercion (Pen. Code, § 236.23)

The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted because of coercion.

In order to establish this defense, the defendant must prove that:

1. **(He/She) acted because of coercion;**
2. **The coercion was a direct result of being a victim of human trafficking at the time the defendant acted;**

AND

3. **When the defendant acted, (he/she) had a reasonable fear of harm.**

To prove that the defendant was the victim of human trafficking, the defendant must prove that:

1. **Another person either deprived the defendant of personal liberty or violated the defendant's personal liberty;**

[AND]

<Give Alternative 2A if the defendant claims he or she was the victim of human trafficking under subsection (a).>

[2A. When the other person acted, (he/she) intended to obtain forced labor or services(./;)]

[OR]

<Give Alternative 2B if the defendant alleges he or she was the victim of human trafficking under subsection (b).>

[2B. When the other person acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of _____ <*insert appropriate code section[s]*>).]

***Depriving or violating a person's personal liberty*, as used here, includes substantial and sustained restriction of a person's liberty accomplished through _____<*insert terms that apply from statutory definition, i.e.: force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury*> to the person under circumstances in which the person receiving or perceiving the threat reasonably believes that it is likely that the person making the threat would carry it out.**

[*Forced labor or services,* as used here, means labor or services that are performed or provided by a person and are obtained or maintained through force, fraud, duress, or coercion, or equivalent conduct that would reasonably overbear the will of the person.]

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[*Duress* means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to].]

[*Duress* includes (a direct or implied threat to destroy, conceal, remove, confiscate, or possess any actual or purported passport or immigration document of the other person/ [or] knowingly destroying, concealing, removing, confiscating, or possessing any actual or purported passport or immigration document of the other person).]

[*Violence* means using physical force that is greater than the force reasonably necessary to restrain someone.]

[*Menace* means a verbal or physical threat of harm[, including use of a deadly weapon]. The threat of harm may be express or implied.]

[*Coercion* includes any scheme, plan, or pattern intended to cause a person to believe that failing to perform an act would result in (serious harm to or physical restraint against someone else/ [or] the abuse or threatened abuse of the legal process/ [or] debt bondage/ [or] providing or facilitating the possession of any controlled substance to impair the other person's judgment).]

[When you decide whether the other person (used *duress*/ [or] used *coercion*/ [or] *deprived the defendant of personal liberty or violated the defendant's personal liberty*), consider all of the circumstances, including the age of the defendant, (his/her) relationship to the other person [or the other person's agent[s]], and the defendant's handicap or disability, if any.

New September 2017

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence, which, if believed, would be sufficient for a

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reasonable jury to find that the defendant has shown the defense to be more likely than not true.

This defense does not apply to a serious felony, as defined in subdivision (c) of Penal Code section 1192.7, or a violent felony, as defined in subdivision (c) of Penal Code section 667.5, or a violation of Penal Code section 236.1.

AUTHORITY

- Instructional Requirements. Pen. Code, § 236.23.
- Definition of Coercion. Pen. Code, § 236.1(h)(1).
- Burden of Proof. *People v. Waters* (1985) 163 Cal.App.3d 935, 938 [209 Cal.Rptr. 661]; *People v. Condley* (1977) 69 Cal.App.3d 999, 1008 [138 Cal.Rptr. 515].
- Human Trafficking Elements and Definitions. Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment]. *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Violence Defined [in context of false imprisonment]. *People v. Babich* (1993) 14 Cal.App.4th 801, 806 [18 Cal.Rptr.2d 60].

Secondary Sources

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Human Trafficking,* § 142.14A (Matthew Bender).

Related Instruction

See CALCRIM No. 1243, *Human Trafficking*.

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3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 29.8)

You have found the defendant guilty of _____ <*insert crime[s]*>. Now you must decide whether (he/she) was legally insane when (he/she) committed the crime[s].

The defendant must prove that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s].

The defendant was legally insane if:

1. **When (he/she) committed the crime[s], (he/she) had a mental disease or defect;**

AND

2. **Because of that disease or defect, (he/she) was incapable of knowing or understanding the nature and quality of (his/her) act or was incapable of knowing or understanding that (his/her) act was morally or legally wrong.**

Do not base a finding of not guilty by reason of insanity solely on the basis of a personality disorder, adjustment disorder, seizure disorder, or an abnormality of personality or character made apparent only by a series of criminal or antisocial acts.

[Special rules apply to an insanity defense involving drugs or alcohol. Addiction to or abuse of drugs or intoxicants, by itself, does not qualify as legal insanity. This is true even if the intoxicants cause organic brain damage or a settled mental disease or defect that lasts after the immediate effects of the intoxicants have worn off. Likewise, a temporary mental condition caused by the recent use of drugs or intoxicants is not legal insanity.]

[If the defendant suffered from a settled mental disease or defect caused by the long-term use of drugs or intoxicants, that settled mental disease or defect combined with another mental disease or defect may qualify as legal insanity. A *settled mental disease or defect* is one that remains after the effect of the drugs or intoxicants has worn off.]

You may consider any evidence that the defendant had a mental disease or defect before the commission of the crime[s]. If you are satisfied that (he/she) had a mental disease or defect before (he/she) committed the crime[s], you may conclude that (he/she) suffered from that same condition when (he/she) committed the crime[s]. You must still decide whether that mental disease or defect constitutes legal insanity.

[If you find the defendant was legally insane at the time of (his/her)

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crime[s], (he/she) will not be released from custody until a court finds (he/she) qualifies for release under California law. Until that time (he/she) will remain in a mental hospital or outpatient treatment program, if appropriate. (He/She) may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for (his/her) crime[s]. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime[s]. You must not speculate as to whether (he/she) is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way.]

[You may find that at times the defendant was legally sane and at other times was legally insane. You must determine whether (he/she) was legally insane when (he/she) committed the crime.]

[If you conclude that the defendant was legally sane at the time (he/she) committed the crime[s], then it is no defense that (he/she) committed the crime[s] as a result of an uncontrollable or irresistible impulse.]

If, after considering all the evidence, all twelve of you conclude the defendant has proved that it is more likely than not that (he/she) was legally insane when (he/she) committed the crime[s], you must return a verdict of not guilty by reason of insanity.

New January 2006; Revised April 2008, October 2010, August 2014, August 2015, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on insanity when the defendant has entered a plea of not guilty by reason of insanity. (Pen. Code, § 25.)

Give the bracketed paragraph that begins with "Special rules apply" when the sole basis of insanity is the defendant's use of intoxicants. (Pen. Code, § 29.8; *People v. Robinson* (1999) 72 Cal.App.4th 421, 427–428 [84 Cal.Rptr.2d 832].) If the defendant's use of intoxicants is not the sole basis or causative factor of insanity, but rather one factor among others, give the bracketed paragraph that begins with "If the defendant suffered from a settled mental." (*Id.* at p. 430, fn. 5.)

Do **not** give CALCRIM No. 224, *Circumstantial Evidence: Sufficiency of Evidence*, or CALCRIM No. 225, *Circumstantial Evidence: Intent or Mental State*. These instructions have "no application when the standard of proof is preponderance of the evidence." (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1274 [18 Cal.Rptr.3d 286].)

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There is no sua sponte duty to inform the jury that an insanity verdict would result in the defendant's commitment to a mental hospital. However, this instruction must be given on request. (*People v. Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People v. Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].)

If the court conducts a bifurcated trial on the insanity plea, the court **must** also give the appropriate post-trial instructions such as CALCRIM No. 3550, *Pre-Deliberation Instructions*, CALCRIM No. 222, *Evidence*, and CALCRIM No. 226, *Witnesses*. (See *In re Ramon M.* (1978) 22 Cal.3d 419, 427, fn. 10 [149 Cal.Rptr. 387, 584 P.2d 524].) These instructions may need to be modified.

AUTHORITY

- Instructional Requirements. Pen. Code, §§ 25, 29.8; *People v. Skinner* (1985) 39 Cal.3d 765 [217 Cal.Rptr. 685, 704 P.2d 752].
- Burden of Proof. Pen. Code, § 25(b).
- Commitment to Hospital. Pen. Code, §§ 1026, 1026.5; *People v. Moore* (1985) 166 Cal.App.3d 540, 556 [211 Cal.Rptr. 856]; *People v. Kelly* (1992) 1 Cal.4th 495, 538 [3 Cal.Rptr.2d 677, 822 P.2d 385].
- Excluded Conditions. Pen. Code, § 29.8.
- Anti-Social Acts. *People v. Fields* (1983) 35 Cal.3d 329, 368–372 [197 Cal.Rptr. 803, 673 P.2d 680]; *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271 [252 Cal.Rptr. 913].
- Long-Term Substance Use. *People v. Robinson* (1999) 72 Cal.App.4th 421, 427 [84 Cal.Rptr.2d 832].
- This Instruction Upheld. *People v. McCarrick* (2016) 6 Cal.App.5th 227, 250–252 [210 Cal.Rptr.3d 838] [delusion also may negate premeditation and deliberation].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 9–16, 18–20.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.02 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, Insanity Trial, §§ 86.01A, 86.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Bifurcated Proceedings

The defendant has a right to bifurcated proceedings on the questions of sanity and guilt. (Pen. Code, § 1026.) When the defendant enters *both* a "not guilty" and a "not guilty by reason of insanity" plea, the defendant must be tried first with

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respect to guilt. If the defendant is found guilty, he or she is then tried with respect to sanity. The defendant may waive bifurcation and have both guilt and sanity tried at the same time. (Pen. Code, § 1026(a).)

Extension of Commitment

The test for extending a person's commitment is not the same as the test for insanity. (*People v. Superior Court (Williams)* (1991) 233 Cal.App.3d 477, 490 [284 Cal.Rptr. 601].) The test for insanity is whether the accused "was incapable of knowing or understanding the nature and quality of his or her act or of distinguishing right from wrong at the time of the commission of the offense." (Pen. Code, § 25(b); *People v. Skinner* (1985) 39 Cal.3d 765, 768 [217 Cal.Rptr. 685, 704 P.2d 752].) In contrast, the standard for recommitment under Penal Code section 1026.5, subdivision (b), is whether a defendant, "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." (*People v. Superior Court, supra,* 233 Cal.App.3d at pp. 489–490; *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr.2d 247].)

Legal and Moral Wrong

The wrong contemplated by the two-part insanity test refers to both the legal wrong and the moral wrong. If the defendant appreciates that his or her act is criminal but does not think it is morally wrong, he or she may still be criminally insane. (See *People v. Skinner* (1985) 39 Cal.3d 765, 777–784 [217 Cal.Rptr. 685]; see also *People v. Stress* (1988) 205 Cal.App.3d 1259, 1271–1274 [252 Cal.Rptr. 913].)

Temporary Insanity

The defendant's insanity does not need to be permanent in order to establish a defense. The relevant inquiry is the defendant's mental state at the time the offense was committed. (*People v. Kelly* (1973) 10 Cal.3d 565, 577 [111 Cal.Rptr. 171, 516 P.2d 875].)

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3456. Initial Commitment of Mentally Disordered Offender as Condition of Parole (Pen. Code, § 2970)

The petition alleges that _____ <*insert name of respondent*> is a mentally disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that at the time of (his/her) hearing before the Board of Parole Hearings:

1. **(He/She) was convicted of _____ <*specify applicable offense(s) from Penal Code section 2962, subdivision (e)(2)*> and received a prison sentence for a fixed period of time;**
2. **(He/She) had a severe mental disorder;**
3. **The severe mental disorder was one of the causes of the crime for which (he/she) was sentenced to prison or was an aggravating factor in the commission of the crime;**
4. **(He/She) was treated for the severe mental disorder in a state or federal prison, a county jail, or a state hospital for 90 days or more within the year before (his/her) parole release date;**
5. **The severe mental disorder either was not in remission, or could not be kept in remission without treatment;**

AND

6. **Because of (his/her) severe mental disorder, (he/she) represented a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

[A severe mental disorder cannot be *kept in remission without treatment* if during the year before the Board of Parole hearing, [on _____ <*insert date of hearing, if desired*>, the person:

<Give one or more alternatives, as applicable>

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[1. Was physically violent except in self-defense; [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3. Intentionally caused property damage; [or]]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____ <*insert name of respondent*> is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008; Revised August 2014, September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for an initial commitment as a condition of parole. For recommitments, give CALCRIM No. 3457, *Extension of Commitment as Mentally Disordered Offender*.

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*, CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, CALCRIM No. 3550, *Pre-Deliberation Instructions*, and any other relevant post-trial instructions. These instructions may need to be modified.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

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AUTHORITY

- Elements and Definitions. Pen. Code, §§ 2962, 2966(b); *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].
- Unanimous Verdict, Burden of Proof. Pen. Code, § 2966(b); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Institutions That May Fulfill the 90-Day Treatment Requirement. Pen. Code, § 2981.
- Treatment Must Be for Serious Mental Disorder Only. *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. Pen. Code, § 2962(a).
- Need for Treatment Established by One Enumerated Act. *People v. Burroughs* (2005) 131 Cal.App.4th 1401, 1407 [32 Cal.Rptr.3d 729].
- Evidence of Later Improvement Not Relevant. Pen. Code, § 2966(b); *People v. Tate* (1994) 29 Cal.App.4th 1678, 1683 [35 Cal.Rptr.2d 250].
- Board of Parole Hearings. Pen. Code, § 5075.
- This Instruction Cited As Authority With Implicit Approval. *People v. Harrison* (2013) 57 Cal.4th 1211, 1230 [164 Cal.Rptr.3d 167, 312 P.3d 88].
- Proof of Recent Overt Act Not Required. Pen. Code, § 2962(g).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, §§ 763–767.

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3457. Extension of Commitment as Mentally Disordered Offender (Pen. Code, § 2970)

The petition alleges that _____ <*insert name of respondent*> is a mentally disordered offender.

To prove this allegation, the People must prove beyond a reasonable doubt that [at the time of (his/her) hearing before the Board of Prison Terms]:

1. **(He/She) (has/had) a severe mental disorder;**
2. **The severe mental disorder (is/was) not in remission or (cannot/could not) be kept in remission without continued treatment;**

AND

3. **Because of (his/her) severe mental disorder, (he/she) (presently represents/represented) a substantial danger of physical harm to others.**

A *severe mental disorder* is an illness or disease or condition that substantially impairs the person's thought, perception of reality, emotional process, or judgment; or that grossly impairs his or her behavior; or that demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely. [It does not include (a personality or adjustment disorder[,]/ [or] epilepsy[,]/ [or] mental retardation or other developmental disabilities[,]/ [or] addiction to or abuse of intoxicating substances).]

***Remission* means that the external signs and symptoms of the severe mental disorder are controlled by either psychotropic medication or psychosocial support.**

[A severe mental disorder cannot be *kept in remission without treatment* if, during the period of the year prior to _____ <*insert the date the trial commenced*> the person:

<Give one or more alternatives, as applicable.>

[1. Was physically violent except in self-defense; [or]]

[2. Made a serious threat of substantial physical harm upon the person of another so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family; [or]]

[3. Intentionally caused property damage; [or]]

[4. Did not voluntarily follow the treatment plan.]]

[A person has voluntarily followed the treatment plan if he or she has

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acted as a reasonable person would in following the treatment plan.]

[A *substantial danger of physical harm* does not require proof of a recent overt act.]

You will receive [a] verdict form[s] on which to indicate your finding whether the allegation that _____ <*insert name of respondent*> is a mentally disordered offender is true or not true. To find the allegation true or not true, all of you must agree. You may not find it to be true unless all of you agree the People have proved it beyond a reasonable doubt.

New December 2008; Revised September 2017

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a mentally disordered offender.

Give this instruction for a successive commitment. For an initial commitment as a condition of parole, give CALCRIM No. 3456, *Initial Commitment of Mentally Disordered Offender as Condition of Parole*.

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*, CALCRIM No. 222, *Evidence*, CALCRIM No. 226, *Witnesses*, CALCRIM No. 3550, *Pre-Deliberation Instructions*, and any other relevant post-trial instructions. These instructions may need to be modified.

Give the bracketed language in the sentence beginning with "To prove this allegation" and use the past tense for an on-parole recommitment pursuant to Penal Code section 2966. For a recommitment after the parole period pursuant to Penal Code sections 2970 and 2972, omit the bracketed phrase and use the present tense.

Case law provides no direct guidance about whether a finding of an enumerated act is necessary to show that the disorder cannot be kept in remission without treatment or whether some alternative showing, such as medical opinion or non-enumerated conduct evidencing lack of remission, would suffice. One published case has said in dictum that "the option of 'cannot be kept in remission without treatment' requires a further showing that the prisoner, within the preceding year, has engaged in violent or threatening conduct or has not voluntarily followed the treatment plan." (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1161, fn. 4 [88 Cal.Rptr.2d 696]). The *Buffington* case involved a sexually violent predator.

The committee found no case law addressing the issue of whether or not instruction about an affirmative obligation to provide treatment exists.

AUTHORITY

- Elements and Definitions. Pen. Code, §§ 2966, 2970, 2972; *People v. Merfield* (2007) 147 Cal.App.4th 1071, 1075, fn. 2 [54 Cal.Rptr.3d 834].

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- Unanimous Verdict, Burden of Proof. Pen. Code, § 2972(a); *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Treatment Must Be for Serious Mental Disorder Only. *People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [19 Cal.Rptr.3d 737].
- Definition of Remission. Pen. Code, § 2962(a).
- Recommitment Must Be for the Same Disorder As That for Which the Offender Received Treatment. *People v. Garcia* (2005) 127 Cal.App.4th 558, 565 [25 Cal.Rptr.3d 660].
- Proof of Recent Overt Act Not Required. Pen. Code, § 2962(g).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 767.

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